UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES SAN FRANCISCO BRANCH OFFICE

KITSAP TENANT SUPPORT SERVICES, INC.	Cases	19-CA-074715
		19-CA-079006
and		19-CA-082869
		19-CA-086006
WASHINGTON FEDERATION OF STATE		19-CA-088935
EMPLOYEES, AMERICAN FEDERATION OF		19-CA-090108
STATE, COUNTY AND MUNICIPAL		19-CA-096118
EMPLOYEES, COUNCIL 28, AFL-CIO		19-CA-099659

Richard Fiol and Elizabeth DeVleming, for the General Counsel.

Gary Lofland (Halverson Northwest Law Group), of Yakima, Washington, for the Respondent.

Terry C, Jensen and SaNni Lemonidis (Robblee Detwiler & Black), of Seattle Washington, for the Union.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Seattle, Washington, on various dates beginning May 28, 2013, and ending November 14, 2013. On February 16, 2012, Washington Federation of State Employees, American Federation of State, County and Municipal Employees, Council 28, AFL-CIO (the Union) filed the original charge in Case 19-CA 074715 alleging that Kitsap Tenant Support Services, Inc. (Respondent) committed certain violations of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act). The Union filed the charge in Case 19-CA-079006 on April 17, 2012. On June 11, 2012, the Union filed the charge in Case 19-CA-082869. On July 25, 2012, the Union filed an amended charge in Case 19-CA-082869. The Union filed amended charges in Case 19-CA-082869 on December 7, 2012, and January 30, 2013, respectively. The Union filed the charge in Case 19-CA-088935 on September 10. 2012. On October 9, 2012, the charge was amended. The charge in Case 19-CA-088935 was amended on October 1, 2912, and again on January 10, 2013. The Charge in Case 19-CA-088938 was filed on September 10, 2012. The Union filed amended charges in Case 19-CA-088938 on January 30 and February 8, 2013.

The charge in Case 19-CA- 090108 was filed on September 26,2012, alleging that Respondent violated Section 8(a)(1) and (5) of the Act. The charge in Case 19-CA-090108 was amended on January 10, 2013. On January 10, 2013, the Union filed the charge in Case 19-CA-096118. The charge in Case 19-CA-099659 was filed on March 4, 2013. On June 22, 2012, the Regional Director for Region 19 of the National Labor Relations Board (the Board) issued a consolidated complaint and notice of hearing against Respondent, alleging that Respondent violated Section 8(a)(5), (3), and (1) of the Act. Respondent filed a timely answer to the complaint, denying all wrongdoing. An order further consolidated complaint was issued on March 27, 2013.

Respondent filed timely answers to the complaints, denying all wrongdoing.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses, and having considered the post-hearing briefs of the parties, I make the following

Findings of Fact

I. Jurisdiction

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The Respondent Corporation, with an office and principal place of business in Bremerton, Washington, has been engaged in the business of providing residential support services. In the 12 months prior to the issuance of the complaint, Respondent, in conducting its business operations, derived gross revenues in excess of \$250,000. Further, Respondent performed services valued in excess of \$50,000 directly to the State of Washington. Accordingly, Respondent admits, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

Respondent's primary business office is located in Bremerton, Washington; it also maintains an office in Port Angeles, Washington. Respondent operates three divisions, home care, tenant support and community protection services. This case involves the Union's attempt to organize Respondent's tenant support services and community protection service operations. The Union was certified as the exclusive representative for direct service staff and head of

¹ The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence, or because it was in and of itself incredible and unworthy of belief.

households in the intensive tenant support program on March 23, 2012. The employees in the community protection services were held to be guards and not included in the bargaining unit.

The Union's organizing campaign began in November 2011. In December 2011 Respondent learned of the Union's campaign and held its first campaign meeting on December 7, 2011. On December 20, the Union filed its petition with Region 19 of the Board seeking to represent a unit of approximately 150 of Respondent's employees in the intensive tenant support services and community protection services programs.

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Employee Bonnie Minor was hired by Respondent in June 2008. At the time of her discharge in December 2011, Minor was working as the head of household at Respondent's Olympus House. In late 2011, Minor was planning Thanksgiving and Christmas parties for Respondent's clients. Minor received calls from other employees that the clients could not afford two parties. Since the Thanksgiving party was only days away, Minor decided to cancel the Christmas party. On December 6, Minor was told by Jamie Callahan, client resource manager, to put the Christmas party back on schedule.

On December 4. Minor became a member of the Union's organizing committee and her picture was printed on a union flyer. On December 7, Minor spoke out in favor of the Union at the Respondent's union campaign meeting. On the morning of December 7, Minor received a phone call from Alan Frey, Respondent's general manager, to tell her to reschedule the Christmas party. He told Minor that she had no right to cancel the party. Minor said she had canceled the party because clients could not afford two parties. Immediately thereafter, Minor rescheduled the Christmas party.

Minor was asked to meet with Frey that afternoon, Minor met with Fry and Human Resources Coordinator Kathy Grice. Frey again told Minor that she had to reschedule their Christmas party. Minor stated that she had already rescheduled the party.

Minor attended Respondent's union campaign meeting shortly after her meeting with Frey. Minor asked Respondent's consultant how much money Respondent was paying him. The consultant declined to answer.

Minor then attended a union meeting. Shortly after the union meeting, Minor received a call from Grice informing her that she was being terminated. Respondent's discharge letter states that Minor failed to follow the protocol set forth by a direct supervisor in regards to a client party and gift exchange. The letter also criticizes Minor for her poor attitude and judgment crossing professional boundaries, misrepresenting information in regards to client and staff causing distress to the clients.

Frey testified that he learned on the morning of December 7, that Minor had told three clients that Frey had screamed and yelled at her and had been mean to her. Frey had a meeting with Minor that afternoon in which she admitted that she told clients that Fry had screamed and yelled at her. When Frey asked why Minor had done so, she answered that Frey was treating her like her father. She admitted that Frey had not yelled or screamed. Frey explained that what Minor had done was "triangulation" and inappropriate. The harm was to clients and the trust

Frey had built with those clients over the years. I find support for Frey's explanation in the testimony of expert witness Allan Comte.

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Employee Alicia Sale began working for Respondent in 2008. Employee Hannah Gates began working for Respondent in 2010. Sale and Gates had their pictures on a pro-union flyer. On December 20, 2011, Sale and Gates were working at Respondent's "men's house. That morning Sale noticed a bruise and scratch on client R. Sale notified Gates of the situation and Gates called the head of household who was at the "women's house." Gates documented the injury in the client's folder. Client R then complained to Sale of a stomachache. Sale and Gates checked R's temperature and bowel movements. At that point the head of household called back and said that Fry and Mieke Middelhoven would be coming to the house. Gates told the head of household about R's stomachache.

That morning, Frey and Mieke Middlehoven, program coordinator, arrived at the men's house. Upon arriving at the house, Frey inspected client R's injury and determined that the bruise had come from client R's wheelchair. Frey instructed Gates and Sale to pad and tape the wheelchair. Fry spoke to the client and asked whether client R had requested to see a doctor. Client R responded that he had. According to Frey, Sale stated that client R had been asking to see a doctor all morning. At the hearing, Sale denied this. According to Frey, Sale stated that there was not enough staff to take client R to the doctor. Middlehoven made arrangements for Sale to go to the women's house and for the head of household to take client R to the doctor.

The following day, Frey returned to the men's house. He found that the wheelchair had not been repaired as he had directed. He taped the wheelchair himself. Frey placed Sale and Gates on administrative leave for failing to provide medical attention to client R and for failing to tape the wheelchair as directed. Both Sale and Gates denied that client R had requested to go to the doctor. It is clear that failure to take a client who has requested medical attention to a doctor is abusive.

On December 23, Sale and Gates were informed by Grice that they were being placed on administrative leave, because they had not taken client R to the doctor and had not timely repaired his wheelchair. Fry reported this incident to the State of Washington.

On February 1, 2012, Fry discharged Sale and Gates for the incidents of December 20.

The State of Washington later dismissed the charges against Sale and Gates substantially because it could not rely on the testimony of client R.

Employee Terry Owens started working for Respondent in the community protection program in February 2011. On December 9, 2011, Owens attended Respondent's union campaign meeting. Owens spoke out in favor of the Union at that meeting. Owens met with Frey on December 12 and presented Frey with 10 questions. Three weeks later, Owens testified for the Union in the representation case.

On February 14, 2012, Frey observed a locked cabinet in the house where Owens worked. Owens explained that client J had agreed to store junk food in the locked cabinet and that the head of household would control client J's food intake. Owens told Frey that client J still had access to other food cabinets; Frey also observed postings that were degrading to client

J. The next day Frey called a meeting with Owens. Frey placed Owens on administrative leave. The head of household was suspended pending investigation and later resigned.

Frey told Owens that he was on administrative leave so that Frey could investigate the locked cabinet. About a week later Owens met with Frey. Owens was discharged on March 28. The Respondent claims that Owens asked to be discharged. Owens was terminated for his treatment of client J; placing restrictions on client J. Frey testified that he observed Owens behavior toward client J and found it to be inappropriate, Frey testified that Owens seemed angry and failed to understand that his approach had been wrong.

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Employee Gary Martell was hired by Respondent in October 2011. In December 2011, Martell began working in the supportive living program. Martell worked with different clients in different locations. On May 22, 2012, the Union notified Respondent that Martell had been elected to the Union's bargaining team. Martell attended a bargaining session on June 4.

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Martell attended a paperwork meeting in the first week of June with Callahan and Parsons. The ledger part of Martell's paperwork was blank. Callahan asked why the paperwork was not done and Martell did not make an excuse. Callahan informed Frey that Martell's paperwork was not complete. Frey took Martell to another room and told him to complete the paperwork.

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A few minutes later, Frey entered the room and stated that Martell was being placed on administrative leave because his paperwork was incomplete. Frey testified that Martell had not performed any work after being placed in the back room. Martell received a letter dated June 8 from Frey stating that he was on administrative leave. Included in the letter were allegations that Martell's schedule included overlaps indicating that Martell was in two places at one time. (GC Exh. 129.) On June 12, Martell met with Frey. According to Frey, at this meeting, Martell acknowledged that there was no excuse for not completing his paperwork. Martell admitted missing service hours for clients.

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After being placed on administrative leave, Martell went to a client's home and told the client that he had been placed on administrative leave. Such conduct is prohibited by Respondent. On July 19, 2012, Martell was terminated by Frey. Martell was terminated for not completing his paperwork, not providing service hours, and visiting a client while on administrative leave.

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Employee Johnnie Driskell began working for Respondent in February 2004. In May 2011, Driskell was demoted from head of household to caregiver. Driskell was later reinstated as a head of household. Driskell was a leader in the union campaign; Her picture was included with union supporters in the Union's mid-December flyer. Driskell was later elected to the Union's bargaining team.

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On June 6, 2012, Driskell was presented with a written warning for being late for her June 4 shift. Driskell had left a phone message on June1, stating that she was switching shifts with another employee on June 4, so that she could participate in the Union's bargaining training Driskell was to report at 4 p.m. on June 4. However, on June 4, Driskell did not report until 4:15 p.m. Overtime was paid to an employee who worked until Driskell arrived.

On Sunday June 24, Frey wrote Driskell regarding a plan of care meeting held without the presence of a member of management. The purpose of plan of care meeting is to review the care needed and the hours of service allocated for the care of the client. Driskell did not call the meeting. According to Frey, Driskelll had worked with the client only 2 months and that a member of management needed to be present. Management requested an additional meeting. As a result of that meeting, the hours of service to the client were increased. Respondent claims that Frey's letter to Driskell was not disciplinary but rather provided guidance to Driskell.

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On July 19, 2012, Driskell received a disciplinary warning for loaning client money.

Driskell claimed that she did what she had done in the past. Frey met with Driskell and a union representative. Driskell claimed that everyone loaned money to clients. Frey cited policy against loaning money to clients. Driskell then claimed that it was not a loan but a gift.

On July 22, while off duty, Driskell received a call from the house where she was head of household. The staff reported that two clients were not getting along and they requested Driskell's assistance. Driskell drove to the house and found that two clients had struggled over a television remote control. Driskell met with Frey the next day but did not mention the incident. After meeting with Frey, Driskell reported the incident to management. Driskell described the incident as pushing. The next day, Frey placed Driskell on suspension.

Respondent placed Driskell on administrative leave pending the investigation of a client-to-client assault. Driskell had not seen any meaningful contact between the clients. Frey reported Driskell to the State of Washington for not reporting a client-to-client assault. A meeting was held between Frey and Driskell and a union representative on August 3. Frey ended the meeting as a result of the union representative's conduct. Frey held another meeting with Driskell on August 14, Frey did not appreciate Driskell's attitude at the meeting. On August 23, Frey terminated Driskell's employment.

Employee Lisa Hennings was hired by Respondent in November 2009. In early 2010, Hennings was promoted to a head of household position. In November 2011, Hennings became involved in the Union's organizing campaign. Her picture appeared on the Union's flyer in December 2011. In December 2012, Hennings attended a meeting at Respondent's Port Angeles office. At the meeting Hennings indicated to Frey that she was in favor of the Union. In May 2012, Hennings was elected to the Union's bargaining committee.

On March 16, 2012, Hennings received a letter of reprimand for loaning clients money. On a trip to a grocery store with three clients, Hennings lent the clients money so that they could pay for all their groceries.

On April12, Hennings received a warning for being late. Hennings had called the head of household to say that she would be a few minutes late. The next day, Hennings spoke with Grice. Grice stated that Hennings had not called the office. Hennings had never before been disciplined for being a few minutes late.

On August 6, Hennings attended a bargaining session as a member of the Union's bargaining team. On August 9, Hennings was writing down the shifts to be worked at her house.

There had been confusion due to employee absences. Frey told Hennings that she had better not be scheduling because there had been testimony in the Board representation case that head of households did not do scheduling. Hennings answered that she was not scheduling but merely helping management. Frey checked with his office and found that Hennings was not helping management with the schedule.

On August 16, Hennings received a letter of direction regarding monthly narratives and medication charting. Hennings was cited for too few narratives of client progress. There were two medical errors in the reports.

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On August 20, Hennings received a written warning for failure to work her assigned shift. On August 17, Frey had driven by the house where Hennings worked and observed her getting out of her car alone. Frey thought Hennings was at another house supporting clients at a party. Hennings explained that she had left the party to aid her daughter and that she had asked another staff person to watch her client. Hennings was written up for not working her assignment and not notifying the office to secure coverage for her client.

In December 2012, Frey and M. E. Closser, Respondent's owner, approached Hennings and complained that the Union had marched on Closser's home. Hennings said that she was not there. Closser and Frey pressed the issue but Hennings denied responsibility.

On February 4, 2013, Frey called Hennings and stated that he had concerns with her work and that she would be placed on administrative leave while he investigated. Thereafter, Hennings was demoted from her position as head of household. There was no reduction in pay. Frey was concerned about her caregiving and training, completing necessary paperwork, completing narratives, leaving clients unattended, and not calling the office. Hennings requested a transfer to the graveyard shift where there was less responsibility.

The Union was certified as the exclusive collective-bargaining agent on March 20, 2012. The Union requested bargaining dates on April 23. On May 21, Respondent agreed to bargaining dates. On May 21, the Union informed Respondent of the identity of the 5 employee members of the bargaining committee. Respondent did not meet with the Union until July 13.

At the July 13 meeting, the Union discussed its first proposal which it provided to Respondent the previous week. Respondent made no proposals at that meeting. On August 6, Respondent made its first proposal. The Union opposed Respondent's proposals on management rights, at-will employment, lack of union security, and removing head of households from the bargaining unit. The Union contended that Respondent's proposals on management rights and at-will employment would nullify nearly everything but compensation that the Union was attempting to bargain for. No tentative agreements were reached but the parties agreed to meet again on September 17.

The parties met on September 17. Prior to that meeting the Union had provided Respondent with modified proposals. Respondent refused to discuss certain proposals. The parties next met on November 26. The parties reached an agreement on the bargaining unit and agreed to meet on December 18. Respondent later canceled the December 18 meeting.

Respondent finally agreed to meet on February 27, 2013. That date was canceled and the parties agreed to meet on March 11 and 12.

In May 2012, Respondent sent the Union a letter in which it stated that it reserved the right for its "Board" to void any tentative agreements. The Union responded asking, "[T]o which Board are you referring to?" Respondent answered that it was referring to its board of directors. The Union sent a request for information on June 1. Respondent answered that request on June 11. On July 17, the Union made a request for information regarding the head of household position. Respondent provided information on October 12, 2012. The Union 10 requested another information request on October 29. The Union requested documents and/or information regarding the money spent on unit employees. Respondent refused to furnish such information.

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Respondent proposed a broad management-rights provision. Further, Respondent proposed an employment at-will provision. The Union sought just cause language. Respondent's proposed grievance provision did not apply unless there was a demonstrated specific violation of the collective-bargaining agreement. In its progressive discipline proposal. Respondent proposed that "the degree of discipline is solely within the judgment" of Respondent. Respondent slightly modified its management-rights proposal on October 16. Eventually the Union agreed substantially to Respondent's management-rights clause.

The General Counsel contends that Respondent failed and refused to bargain in good faith regarding the head of household position. On September 6, Respondent told the Union that it would bargain to impasse over the elimination of the head of household position and later implement its position. On November 26, the parties reached tentative agreement on the bargaining unit which included the heads of household. However, on April 12, 2013, Respondent stated that it would seek to eliminate the head of household position and create a supervisory household manager position.

The General Counsel contends that Respondent maintained the following rules in violation of Section 8(a)(1):

Professional Standards: In the course of your work, you may have occasion to learn of matters which are confidential. It is your ethical obligation to consider all information about residents, clients, their families, and fellow employees, as privileged. You are expected to keep this knowledge in strict confidence. Never discuss any facet of Kitsap Tenant Services, inc. or its programs either in or outside of your work site where they can be overheard by unauthorized people. To protect yourself from accidental infringement of the policy, please refer all matters to your Coordinator.

Professional Boundaries: When an employee is no longer employed by KTSS, Inc., they are required to sign a confidentiality agreement stating they have not and will not reveal Client information or confidential matters learned while in the employ of the agency... Further, the employee must certify that they have not, nor in any way been party to or knowingly permitted:

• Disclosure of any confidential matters, or trade secrets of Kitsap Tenant Services, Inc.

• Retention or duplication of any confidential materials or documents issued to or used by the employee during employment.

Employee Professional Relationships: You understand that you are not allowed to discuss any issue regarding your job performance or relationships with co-workers or supervisors with Clients or within earshot of Clients.

Canvassing or Soliciting: Staff members are expected to keep such activities from occurring on our premises and work sites. Employees are not allowed to sell, push products, or philosophy, religion to Clients or staff.

Conditions of Employment: Employee agrees not to divulge, publish, or otherwise make known to unauthorized persons or to the public any information contained in the course of providing services, where release of such information may possibly make the person or persons whom are receiving such services, supervisors, Clients families and/or fellow Caregivers identifiable. Employees should recognize that unauthorized release of confidential information might subject them to civil liability under the provisions of State law and/or dismissal from KTSS, Inc.

20 Reasons for Termination:

- *Violation of Client and/or program confidentiality.
- * Violation of policy and procedures of company.
- * Misconduct as defined in the orientation manual.
- * Failure to follow the Employee Professional Relationships Contract.
- *Failure to sign and follow the Maintaining Client Confidentiality.

Misconduct: Giving Client information or opinions of the inner workings of the office (similar to rules previously mentioned).

III. Conclusions

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The Rules

The Board held in *Kinder-Care Learning Centers*, 299 NLRB 1171 (1990), that employees have a Section 7 right to communicate regarding their terms and conditions of employment to other employees, an employer's customers, the media, and the public. In *Beth Israel Hospital v. NLRB*, 437 US 483 (1978), it was held that a hospital could prohibit solicitations in patient care areas because "the primary function of a hospital is patient care and a tranquil atmosphere is essential to carrying out that function." Here, Respondent has a fiduciary duty to keep client information confidential. Its clients are developmentally disabled and vulnerable, and should be protected concerning any information regarding their identity or plan of treatment. Information regarding Respondent's relationship with its caregivers could cause emotional problems for Respondent's developmentally disabled clients. Under these circumstances, I view patient care areas as anywhere the client may be. Thus, I find that Respondent's rule regarding discussing any issues related to job performance or relationships with coworkers or supervisors with clients or within earshot of clients' is necessary and a lawful exception to the general rule.

Employees have a Section 7 right to communicate regarding their terms and conditions of employment to other employees, an employer's customers, the media, and the public. When an employee is no longer employed by Respondent he or she is required to sign a confidentiality agreement stating they have not and will not reveal client information or confidential matters learned while in the employ of the agency. I find this rule too broad and thus violative of Section 7 of the Act.

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The Employee Discipline

In cases involving dual motivation, the Board employs the test set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983). Initially, the General Counsel must establish by a preponderance of the credible evidence that antiunion sentiment was a "motivating factor" for the discipline or discharge. This means that the General Counsel must prove that the employee was engaged in protected activity, that the employer knew the employee was engaged in protected activity, and that the protected activity was a motivating reason for the employer's action. *Wright Line*, supra, 251 NLRB at 1090. Unlawful motivation may be found based upon direct evidence of employer animus toward the protected activity. *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004).

Alternatively, proof of discriminatory motivation may be based on circumstantial evidence, as described in *Robert Orr/Sysco Food Services*, supra:

To support an inference of unlawful motivation, the Board looks to such factors as inconsistencies between the proffered reasons for the discipline and other actions of the employer, disparate treatment of certain employees compared to other employees with similar work records or offenses, deviations from past practice, and proximity in time of the discipline to the union activity. *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003).

If the General Counsel has satisfied the initial burden, the burden of persuasion shifts to Respondent to show by a preponderance of the credible evidence that it would have taken the same action even in the absence of the employee's protected activity. If Respondent advances reasons which are found to be false, an inference that the true motive is an unlawful one may be warranted. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). However, Respondent's defense does not fail simply because not all the evidence supports its defense or because some evidence tends to refute it. *Merrilat Industries*, 307 NLRB 1301, 1303 (1992). Ultimately, the General Counsel retains the burden of proving discrimination. *Wright Line*, supra, 251 NLRB at 1088 fn. 11.

The General Counsel has established both Bonnie Minor's union activities and the knowledge or constructive knowledge of those activities by Respondent. There is no doubt that Minor took the actions for which she was terminated. The issue as to Minor is whether or not the conduct was the reason for the discharge rather than her protected union activities. It is therefore the termination process that must be examined. The termination of Minor involved multiple steps and multiple actions by Respondent's Frey. Each must be evaluated under the standard set forth above.

First, I find that the actions of Frey regarding the Christmas party did not involve disparate treatment of Minor. Thus, I find that the initiation of the meeting respecting the incident was not improper. I further find that that in telling clients that Frey had yelled and screamed at her, Minor engaged in a major violation of policy.

Having gotten past the investigative process, scrutiny must fall on the discharge decision. I have considered the demeanor of the witnesses, the arguments of the parties on brief and the record as well on this critical issue. I find that the General Counsel has not met his initial burden to show that antiunion sentiment was a "motivating factor" for Minor's discharge.

Considering the context, I find that the General Counsel has not been able to demonstrate by a preponderance of the credible evidence that the discharge involving Minor was based on antiunion sentiment. Finally, I find there was no antiunion animus in the final discharge decision taken or its being carried out as set forth above.

Given this finding, it follows that the General Counsel has failed to prove that Bonnie Minor was fired for union activities as alleged in the complaint. Therefore I shall dismiss those complaint paragraphs that apply to Minor.

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In cases involving dual motivation, the Board employs the test set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983). Initially, the General Counsel must establish by a preponderance of the credible evidence that antiunion sentiment was a "motivating factor" for the discipline or discharge. This means that General Counsel must prove that the employee was engaged in protected activity, that the employer knew the employee was engaged in protected activity, and that the protected activity was a motivating reason for the employer's action. *Wright Line*, supra, 251 NLRB at 1090. Unlawful motivation may be found based upon direct evidence of employer animus toward the protected activity. *Robert Orr/Sysco Food Services*, 343 NLRB at 1184/ Alternatively, proof of discriminatory motivation may be based on circumstantial evidence, as described in *Robert Orr/Sysco Food Services*, supra:

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To support an inference of unlawful motivation, the Board looks to such factors as inconsistencies between the proffered reasons for the discipline and other actions of the employer, disparate treatment of certain employees compared to other employees with similar work records or offenses, deviations from past practice, and proximity in time of the discipline to the union activity. *Embassy Vacation Resorts*, 340 NLRB at 848.

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When the General Counsel has satisfied the initial burden, the burden of persuasion shifts to Respondent to show by a preponderance of the credible evidence that it would have taken the same action even in the absence of the employee's protected activity. If Respondent advances reasons which are found to be false, an inference that the true motive is an unlawful one may be warranted. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). However, Respondent's defense does not fail simply because not all the evidence supports its defense or because some evidence tends to refute it. *Merrilat Industries*, 307 NLRB 1301, 1303 (1992).

Ultimately, the General Counsel retains the burden of proving discrimination. *Wright Line*, supra, 251 NLRB at 1088, fn. 11.

The General Counsel has established union activity by Alicia Sale and Hannah Gates. The issue here involves Respondent's reason for the discharge. Frey heard from client R that he had requested to see a doctor. Sale and Gates initially stated that they did not have the staff to take client R to the doctor. Frey asked them to tape client R's wheelchair and this was not done. Frey reported the failure to take client R to the doctor to the State of Washington. Here, I find that Frey acted upon his belief that Sale and Gates had improperly failed to take client R to the doctor. Thus, I find that Respondent has established that these employees would have been discharged even in the absence of union activities.

Terry Owens

In all cases turning on employer motivation, causation is determined pursuant to *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (lst Cir. 1981), cert. denied 455 U.S. 989 (1982). Initially, the General Counsel must prove, by a preponderance of the evidence, that protected conduct was a "motivating factor" in the employer's decision. To establish this showing, the General Counsel must adduce evidence of protected activity, Respondent's knowledge of the protected activity, Respondent's animus toward the protected activity, and a link or nexus between the protected activity and the adverse employment action. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991). If the General Counsel makes this initial showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the employees' union activity. *American Gardens Management Co.*, 338 NLRB 644, 645 (2002), citing *Taylor & Gaskin, Inc.*, 277 NLRB 563 fn. 2 (1985), both incorporating *Wright Line*, supra.

The General Counsel has established that Owens was engaged in union activities and that Respondent had knowledge of those activities. Respondent established that Owens had taken part in restricting client J's access to food supplies and was aware of, if not the author of improper notices to client J. Frey observed and found wanting Owens interactions with client J. Accordingly, I find that Respondent established that Owens would have been discharged even in the absence of his union activities.

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The General Counsel has established that Martell engaged in union activities and that Respondent had knowledge of such activities. However, Martell failed to complete his required paperwork. Martell had no excuse for this failure. Martell was suspended pending an investigation. Martell improperly visited a client at the client's home and told the client that he had been suspended. Thereafter, Frey discharged Martell. Again, I find that Respondent has established that Martell engaged in conduct for which he would be discharged even in the absence of his union activities.

Johnnie Driskell

The General Counsel has established both Driskell's union activities and the knowledge of those activities by Respondent. There is no doubt that Driskell took the actions for which she was terminated. The issue as to Driskell is whether or not the conduct was the reason for the discharge rather than her protected union activities. It is therefore the termination process that must be examined. The termination of Driskell involved multiple steps and multiple actions by Respondent's Frey. Each must be evaluated under the standard set forth above.

First, I find that the action of Frey regarding Driskell's being late on June 6 questionable. Driskell had made arrangements to cover her shift and called when she would be late. Driskell received a letter of direction for not notifying Respondent of a plan of care meeting. This letter was not discipline. Further, this action was based on Driskell's conduct and not her union activities. Driskell received a warning for loaning a client money. This was in violation of company policy.

On July 22 Driskell intervened in a client-to-client dispute. She described the incident as pushing. Frey believed that there was client-to-client battery and reported this incident to the State of Washington. Driskell met with Frey on July 23 but did not mention the client dispute.

I have considered the demeanor of the witnesses, the arguments of the parties on brief, and the record as a while on this critical issue. I find that the General Counsel has not met his initial burden to show that antiunion sentiment was a "motivating factor" for Driskell's discharge.

Considering the context, I find that the General Counsel has not been able to demonstrate by a preponderance of the credible evidence that the discharge involving Driskell was based on antiunion sentiment. Finally, I find there was no antiunion animus in the final discharge decision taken or its being carried out as set forth above.

Given this finding, it follows that the General Counsel has failed to prove that Johnnie Driskell was fired for union activities as alleged in the complaint. Therefore I shall dismiss those complaint paragraphs that apply to Driskell.

35 Lisa Hennings

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In all cases turning on employer motivation, causation is determined pursuant to *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (lst. Cir. 1981), cert. denied 455 U.S. 989 (1982). Initially, the General Counsel must prove, by a preponderance of the evidence, that protected conduct was a "motivating factor" in the employer's decision. To establish this showing, the General Counsel must adduce evidence of protected activity, Respondent's knowledge of the protected activity, Respondent's animus toward the protected activity, and a link or nexus between the protected activity and the adverse employment action. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991). If the General Counsel makes this initial showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the employees' union activity. *American Gardens Management Co.*, 338 NLRB at

645, citing *Taylor & Gaskin, Inc.*, 277 NLRB 563 fn. 2 (1985), both incorporating *Wright Line*, supra.

The General Counsel has established that Lisa Hennings engaged in union activities and that Respondent had knowledge of those activities. Hennings received a letter of reprimand for loaning money to three clients. I find that this discipline was based on Hennings conduct and not her union activities. Hennings received a warning for being 7 minutes late. Other employees were late for longer periods of time without receiving discipline. Respondent did not explain this discrepancy.

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Frey disciplined Hennings for staff scheduling. Frey said that since employees had testified that head of households had not done scheduling, Hennings should not be scheduling. Frey did not explain the inconsistency where Respondent had offered evidence in the representation case that heads of household did scheduling for their households.

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Hennings received discipline for not doing narratives and for errors in medication charting. I find this discipline to be based in business reasons and, therefore, not discriminatory. Hennings received a warning for an incident on August 20. Frey had observed Hennings driving in her car when she was supposed to be at a party with a client. I find no violation in this discipline.

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Respondent ultimately demoted Hennings for missing medical appointments, errors in medical charts, and her past disciplines. I find that the warnings to Hennings for being late and for scheduling were unlawful. To the extent that these warnings played a part in her demotion, I find the demotion unlawful.

The Alleged Refusal to Bargain

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In determining good-faith bargaining, the Board examines the totality of the party's conduct both at and away from the bargaining table including delay tactics, failure and/or delay in providing information, unpalatable bargaining demands, and refusal to explain bargaining positions. *Fruehauf Trailer Services*, 335 NLRB 393 (2001). The determination of a party's subjective good faith in bargaining depends on an examination of the "totality of the circumstances". *NLRB v. Tomco Communications*, 567 F.2d 871, 883 (9th Cir. 1978). The Supreme Court has held that "the Board may not either directly or indirectly, compel concessions or otherwise sit in judgment on the substantive terms of collective bargaining agreements." *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 106 (1970).

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Section 8(a)(5) and (d) of the Act obligates parties to "confer in good faith with respect to wages, hours, and other terms and conditions of employment." *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 344 (1958). The good-faith requirement means that a party may not "negotiate" with a closed mind or decline to negotiate on a mandatory subject with a closed mind or decline to negotiate on a mandatory bargaining subject. "While Congress did not compel agreement between employers and bargaining representatives, it did require collective bargaining in the hope that agreements would result." *NLRB v, Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956). Sincere effort to reach common ground is of the essence is of the essence of good-faith

bargaining. *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676, 686 (9th Cir. 1943); *NLRB v. Reed & Prince Mfg. Co.*, 118 F.2d 874, 885 (1st Cir.), cert. denied 313 U.S. 595 (1941).

The quantity or length of bargaining does not establish or equate with good-faith bargaining. *NLRB v. American National Insurance Co.*, 343 U.S. 395, 404 (1952). The Board will consider the "totality of the conduct" in assessing whether bargaining was done in good faith. *NLRB v. Suffield Academy*, 322 F.2d 196 (2d Cir. 2003).

The General Counsel argues that Respondent delayed bargaining and engaged in dilatory tactics. Then after bargaining commenced, Respondent continued to delay. It canceled meetings in July and August. As a result, the parties only met six times since March 2012. In my view, this is evidence of bad faith. *Fruehauf Trailer Services*, 335 NLRB 393 (2001).

The General Counsel further argues that Respondent put forth proposals that were repugnant to the Union. First, the General Counsel alleges that Respondent's proposed management-rights provision was so broad as to be repugnant to the Union. However, the Union agreed to Respondent's proposal with a minor exception.

The General Counsel further argues that Respondent's proposal to change the head of household position to a management position was evidence of bad faith. Section 8(a)(5) prohibits a party's insistence upon a permissible subject as a condition precedent to entering an agreement and precludes a good-faith impasse. *Borg-Warner Corp.*, 356 U.S. at 347-349. However, Respondent did not insist on this provision to impasse. No impasse was ever reached.

25 Conclusions of Law

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- 1. Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.
 - 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
- 3. Respondent violated Section 8(a)(5) and (1) of the Act by refusing to delayed bargaining after the certification for almost 4 months.
- 4. Respondent violated Section 8(a)(1) by maintaining a rule prohibiting former employees from revealing client information or confidential matters learned while in the employ of the agency
- 5. Respondent violated Section 8(a)(3) and (1) by disciplining Lisa Hennings for being late and for scheduling employees.
 - 6. Respondent violated Section 8(a)(3) and (1) for demoting Lisa Hennings from her position as head of household.
- 7. Respondent's conduct above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action to effectuate the purposes and policies of the Act. Accordingly, I shall order Respondent to resume collective bargaining with the Union.

Having discriminatorily demoted employee Lisa Hennings, Respondent must offer her reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of demotion to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Respondent must also be required to remove any and all references to its unlawful discipline of Hennings, from its files and notify Hennings in writing that this has been done and that the unlawful discipline will not be the basis for any adverse action against her in the future. *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.²

ORDER

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The Respondent, Kitsap Tenant Support Services, Inc, Bremerton and Port Angeles, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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- (a) Refusing to bargain collectively by delaying bargaining for 4 months.
- (b) Maintaining a rule whereby former employees are prohibited from revealing client information or confidential matters learned while in the employ of the agency.

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- (c) Disciplining or demoting employees for engaging in union activities.
- (d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

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2. Take the following affirmative action necessary to effectuate the policies of the Act.

² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Upon request, meet and bargain with the Union as the exclusive collective-bargaining representative of its employees in the appropriate bargaining unit described below:

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All full-time and regular part-time employees working for Respondent as Direct Service Staff (DSS) or Head of Households (HOHs) in Respondent's Intensive Tenant Support Program (ITS) and Direct Service (DSS) working in Respondent's Supported Living Lite Program (SLI ite Programs), including such programs in Respondent's d/b/a, Olympic Peninsula Supported Living (OPSL) operations, located in or about Kitsap County, Port Angeles, and Port Townsend, Washington; excluding employees working in the Homecare division, Head of Households (HOHs) and Direct Service Staff (DSS) working in the Community Protection Program (CP Program) because they are guards as defined by the Act, and all other guards and supervisors as defined by the Act.

with respect to rates of pay, hours of employment, and other terms and conditions, and if an understanding is reached, embody such understanding in a signed agreement.

- (b) Within 14 days from the date of this Order, offer Lisa Hennings full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed but for her unlawful demotion.
- (c) Make Hennings whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.
- (d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline of Hennings, and within 3 days thereafter notify her in writing that this has been done and that the discipline will not be used against her in any way.
- (e) Within 14 days after service by the Region, post at its facilities in Bremerton and Port Angeles, Washington, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

5	(f) Within 21 days after service by the Region, file with the Regional Director for Region 19, a sworn certification of a responsible official on a form provided by Region 19 attesting to the steps the Respondent has taken to comply herewith.

February 16, 2012.

all current employees and former employees employed by the Respondent at any time since

Dated, Washington, D.C. June 4, 2014

Jay R. Pollack
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively by delaying bargaining for 4 months.

WE WILL NOT maintain a rule which prohibits former employees from discussing matters learned while employed by us.

WE WILL NOT discipline and/or demote employees because of their union activities.

WE WILL NOT make reference to the permanently removed materials in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker and we will not use the permanently removed material against this employee.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL upon request, meet and bargain with the Union as the exclusive collective-bargaining representative of our employees in the appropriate bargaining unit described below:

All full-time and regular part-time employees working for Respondent as Direct Service Staff (DSS) or Head of Households (HOHs) in Respondent's Intensive Tenant Support Program (ITS) and Direct Service (DSS) working in Respondent's Supported Living Lite Program (SLl ite Programs), including such programs in Respondent's d/b/a, Olympic Peninsula Supported Living (OPSL) operations, located in or about Kitsap County, Port Angeles, and Port Townsend, Washington; excluding employees working in the Homecare division, Head of Households (HOHs) and Direct Service Staff (DSS) working in the Community Protection Program (CP Program) because they are guards as defined by the Act, and all other guards and supervisors as defined by the Act

with respect to rates of pay, hours of employment, and other terms and conditions, and if an understanding is reached, embody such understanding in a signed agreement.

WE WILL make Lisa Hennings whole for her loss of earnings, if any, for unlawful discipline and demotion, with interest.

WE WILL remove from our files any reference to the unlawful discipline of Hennings and

	_	KITSAP TENANT SUPPO	RT SERVICES, INC.
		(Employe	er)
Dated	Ву		
		(Representative)	(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

915 2nd Avenue, Room 2948, Seattle, WA 98174-1078 (206) 220-6300, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/19-CA-074715 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (206) 220-6284.